88- 1779

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

S.E. NICHOLS, INC.,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the court of appeals err as a matter of law when it enforced an order of the National Labor Relations Board which imposed a multi-site remedy—a remedy unprecedented in its scope, unjustified because unfair labor practices were charged at and impacted upon only one site, punitive in nature, and not designed to effectuate the purposes of the National Labor Relations Act?

2. Does the long-delayed grant of such multi-site and broad access remedies upon this record violate fundamental consititutional precepts of free speech, due process and equal protection of law?

3. Did the court of appeals err as a matter of law when upon this record it enforced a National Labor Relations Board order that was rendered six and one-half years after the decision of the Administrative Law Judge was submitted to the NLRB for review, and enforcement of the order was not sought for another ten months?

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No.

IN THE

Supreme Court of the United States

October Term, 1988

S.E. NICHOLS, INC.,

Petitioner,

–vs.–

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS — FOR THE SECOND CIRCUIT

Petitioner S.E. Nichols, Inc. ("Nichols" or the "Company") respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 29, 1988 and January 3, 1989 respectively, enforcing an order of the National Labor Relations Board (the "NLRB" or "Board") entered against Nichols on June 30, 1987. The NLRB's order had affirmed a six and one-half year old decision of an Administrative Law Judge (the "ALJ") rendered December 31, 1980. The Board's petition for enforcement was not filed until April 21, 1988, ten months after the NLRB's order.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 862 F.2d 952 (2d Cir. 1988), and appears in the appendix hereto ("App.") at

1a. The judgment entered by the Clerk of the Court of Appeals appears at App. 1b. The opinion of the NLRB is reported at 284 NLRB no. 55 (1987) and appears at App. 1c. The December 31, 1980 decision of the ALJ appears at App. 1d. The July 8, 1980 decision of District Judge McCurn denying the Board's Section 10(j) petition for an injunction and the Second Circuit's February 18, 1981 affirmance of that decision appear at App. 1e and 1f, respectively.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on November 29, 1988 and January 3, 1989. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 10(c) of the Act, in pertinent part, provides:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter. . . .

STATEMENT OF THE CASE

This petition brings to this Court for review a consolidated proceeding launched by respondent NLRB against petitioner Nichols. The consolidated proceedings resulted in the issuance of the ALJ's December 31, 1980 decision and the Board's decision and order (the "Order") rendered six and a half years later on June 30, 1987, affirming, with modification, the ALJ's decision

(App. 1c). Board Chairman Dotson dissented from the multi-site remedies ordered and "to the extent they [the Board] order *any* additions to the conventional remedies" (App. 6lc).

On April 20, 1988, almost ten (10) months later, the Board applied to the United States Court of Appeals for the Second Circuit for enforcement of the Order. Nichols answered and cross-petitioned. By decision dated November 29, 1988 and Judgment dated January 3, 1989, the Court of Appeals granted enforcement, with one modification, and denied Nichols' cross-petition (App. 1a).

UNDERLYING FACTS

Nichols, a New York corporation, owns and operates more than forty self-service, discount, retail department stores in ten states, including one store in Herkimer, New York. By order dated July 3, 1980, the ALJ, over Nichols' objection, consolidated two proceedings arising from events that occurred only at that store.

The first case involved allegations of unlawful discharges in September 1979 at the Herkimer store, and allegations that Nichols, at various meetings with employees at that store and in its company handbook, made statements and maintained rules allegedly in violation of Section 8(a) (1) of the act.

Prior to the rendering of a decision in the first case, the union filed new charges on April 7, 1980 and the Board issued a complaint in the second case on May 8, 1980 alleging that Nichols had violated (i) Section 8(a) (1) of the Act by interrogating two employees concerning testimony they were to give in the March 1980 hearing in the first case, (ii) Sections 8(a) (3) and (4) of the Act by disciplining or otherwise retaliating against three employees who had given testimony on behalf of the Board's Regional Director at the March hearing, and (iii) Section 8(a) (i) by interfering with em-

employees at the Herkimer store in the exercise of their rights to participate in or resort to Board processes.

After the complaint in the second case was issued, on June 13, 1980, the Regional Director petitioned in the United States District Court for the Northern District of New York, for an injunction pursuant to Section 10(j) of the Act with respect to the unfair labor practices alleged in the Board's complaint in the second case (*DeProspero* v. *S.E. Nichols, Inc.* (N.D.N.Y. 80 CV 467)). After a full hearing with testimony by ten witnesses on July 1, 2, 7 and 8, 1980, District Judge McCurn found that there was no reasonable cause to believe the alleged acts had taken place and refused to issue the requested injunction (App. 1e).[1] In its decision filed February 18, 1981, the Second Circuit affirmed, holding that injunctive relief was not warranted on the record (App. 1f).

On September 15, 1980, a hearing in the second case was held before the ALJ. The parties stipulated to have the record in that case consist of the same record that was made before Judge McCurn.

On December 31, 1980, the ALJ issued a decision in the consolidated proceedings which included a cease and desist order against Nichols and further required the Company to offer reinstatement to four employees, grant one employee a wage increase, provide these employees with back pay and remove certain warnings from employee files. In addition to these traditional remedies, the ALJ imposed a number of extraordinary requirements, including the posting of a notice in all 43 Nichols stores, the mailing of that notice to all employees at those stores, and the reading of that same notice during working time in each store by Nichols' president, Manfred Brecker ("Mr. Brecker"). Further, the ALJ required Nichols to provide extraordinary access for a period of two years to any interested union.

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[1] In the meanwhile, an election was held at the Herkimer store in which the employees voted 47 to 9 against designating the union as their bargaining agent.

THE BOARD'S DECISION AND THE COURT OF APPEALS' AFFIRMANCE

After an unprecedented and unexplained delay of *six and one-half years*, the Board affirmed the ALJ's order, modifying it in regard to the breadth of the order. While the Board did not uphold the ALJ's imposition of a company-wide remedy, it did approve implementation of the ALJ's order with respect to eight stores.

The majority's decision to equate the breadth of the Board's sanctions with the breadth of the territory assigned to Nichols' district supervisor Henry Korcz ("Korcz"), was opposed by the Board's chairman. In a vigorous dissent against any multi-site remedies (App. 51c), Chairman Dotson parted company with the majority on the appropriateness of the breadth of the Board's sanctions, and he parted company with the majority "to the extent they order *any* additions to the conventional remedies" (App. 62c). Indeed, Chairman Dotson stated his belief that the prescribed remedy was the result of the Board's personal animus toward Mr. Brecker. "While the Respondent's impressions of the Board are unfortunate," he dissented, "we cannot allow them to serve as a justification for punishing the Respondent through punitive remedies that far outreach the specific violations herein" (App. 65c).

The Court of Appeals, in granting enforcement of the Board's Order, with one modification, reached several erroneous conclusions of law. While Nichols does not seek review of that portion of the Court of Appeals' decision which finds substantial evidence in the record to support the Board's determinations concerning the individual employees, Nichols does seek this Court's review of the Court of Appeals' affirmance of the Board's harsh and overbroad multi-site notice and access remedies which are punitive in nature and fail to "effectuate the policies of" the Act.

REASONS FOR GRANTING THE WRIT

I.

The Court Below Incorrectly Enforced The Board's Order Because The Board Abused Its Discretion In Fashioning Unwarranted, Overbroad Multi-Site Remedies To Be Imposed Upon Nichols

A. Introduction

Although the Board's remedial power "is a broad discretionary one, subject to limited judicial review," *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964), the Board has far exceeded the scope of its power. It has overstepped by leaps and bounds the limits of the remedial powers entrusted to it by the Act, and has, in essence, prescribed a punitive remedy. In an unconstitutional attempt to silence Brecker, the Board has imposed an unwarranted and unprecedented harsh remedy, and, in so doing, it has departed significantly from the remedies previously approved on review in the federal courts.

The federal courts which have considered the issue have carefully scrutinized the notice provisions of Board imposed remedies. Here, the issue concerns the appropriateness of the Board's broad application of posting, mailing and reading requirements. Cumulatively, the application of these remedies is unprecedented and punitive in nature.[2]

Although the Board cut back the multi-site remedies from a company-wide 43 stores to a district-wide eight stores in two non-

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[2] The Court of Appeals, in its decision, seeks to justify affirmance of the extraordinary notice and access remedies by adopting the conclusion of the ALJ, reached in December of 1980, *seven and one-half years ago*, and of the Board in June 1987, that Mr. Brecker's alleged attack on the Board's neutrality poisoned the atmosphere (App. 46a, 47a). Aside from the fact that almost eight years later there has been a change in the employee staff and that the atmosphere is naturally no longer what it once was, the record does not warrant or support the extraordinary notice and access remedies that the Court of Appeals has affirmed.

contiguous states, as Chairman Dotson recognized in his well-reasoned dissent, there is no evidence that any alleged events at Herkimer had any impact at any other Nichols store (App. 63c-64c).

Moreover, when one considers that the remedy is based on a record in a consolidated case in which the record in one case was so unimpressive that a federal judge held there was no reasonable cause to believe that the alleged unfair labor practices had occurred, it is apparent that multi-site remedies are not justified.[3]

Furthermore, the Writ should be granted to enable this Court to consider the guidelines to be applied where long delayed Board action creates a harsh, unfair result. The Board took six and one-half years to rule on the ALJ's decision (and another ten months to seek enforcement). During that time there have been no unfair labor practice cases against Nichols; this is proof positive that the multi-site and extraordinary access remedies sought to be imposed by a split Board are inappropriate and not necessary to effectuate the purposes of the Act, and that their imposition would be punitive in nature. The Court below erroneously ignored the extraordinary, unprecedented delay by the Board in rendering the decision. The delay by itself undercuts any claim that extraordinary remedies are needed or warranted.

Under these circumstances, Nichols contends that enforcement of such remedies would be a denial of equal protection and denial of its due process right to a prompt administrative agency decision. Moreover, to apply remedies to sites where there has been no evidence of unfair labor practices is likewise a denial of due process.

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[3] In addition, such broad remedies are inappropriate when the Board has admitted in proceedings before the NLRB in September 1980 that "the ultimate merits of the case may not be entirely free from doubt."

B. The Requirement Of A Divisionwide Posting And Mailing Is Unwarranted

The Board's Order requiring a district-wide posting and mailing of the prescribed notice is patently overbroad, unwarranted by the record and punitive. Thus, it is significant that Chairman Dotson stated:

> [T]he Board should not allow the use of a respondent's history of unlawful conduct as a per se justification for punitive remedies that do not specifically address the unfair labor practices found in a particular case. The majority's imposition herein of extraordinary remedies in all of the stores in Korcz' division represents just such a practice. Because in my view the record here does not support a finding that even divisionwide remedies are necessary to offset the coercive effects caused by the Respondent's conduct at issue in this proceeding, I would require only the conventional remedies detailed in the Order. (App. 65c-66c)

Although courts have accepted certain posting and mailing requirements, they have required broad orders to undergo strict scrutiny. Thus, the courts have required geographic proximity, *Texas Gulf Sulphur Co.* v. *NLRB*, 463 F.2d 778, 779 (5th Cir. 1972), the existence of a "close association" between groups of stores, *NLRB* v. *Delchamps, Inc.*, 92 LC ¶12,943 at p.18, 359 (5th Cir. 1981), *reh'g denied*, 660 F.2d 499 (5th Cir 1981), the existence of unfair labor practices at all or substantially all stores, *United Aircraft Corp.* v. *NLRB*, 65 LC ¶11,576 at p.20, 840 (2d Cir. 1971), "a system-wide and centrally coordinated movement to commit unfair labor practices," *Decaturville Sportswear Co.* v. *NLRB*, 406 F.2d 886, 889 (6th Cir. 1969), a substantial degree of notoriety of the employer's unfair labor practices, *NLRB* v. *Great Atlantic & Pacific Tea Co.*, 59 LC ¶13,327 at p.23, 673 (5th Cir. 1969); *NLRB* v. *T.W. Phillips Gas & Oil Co.*, 141 F.2d 304, 306 (3d Cir. 1944), or the intention or existence of a "chilling effect" on labor relations at other locations. *J.P. Stevens & Co., Inc.* v. *NLRB*, 417 F.2d 533, 540 (5th Cir. 1969).

In the present case, neither the ALJ nor the Board made findings on these issues. Indeed application of these criteria to the instant record compels a far less stringent remedy than that which the Board imposed and the Court of Appeals affirmed. First, the campaign activities by both sides in respect of the 1979 election at the Herkimer store were strictly limited to that store. Second, the eight Nichols stores covered by the Board's order are not well-suited to geographic classification. *See Texas Gulf Sulphur, supra.* Although they are all supervised by one man, most of the stores are remote from the others. Third, there is also no "close association" between the stores. *See Delchamps, supra.* There is no evidence that employees are ordinarily transferred between stores—indeed, they are not—or that there is a common bargaining unit within the group of named stores—which has never been the case.

Further, there was no finding of unfair labor practices at any of the stores in the division. *See United Aircraft, supra.* While the Board noted that unfair labor practices had at one time existed at two other stores in Korcz's division, those practices were not concurrent with the violations at bar, were unrelated to the Herkimer election, and provide no justification for the expansive remedy authorized by the Board and upheld on appeal. Certainly they do not constitute the system-wide action contemplated by the Sixth Circuit in *Decaturville, supra.*

Any justification for the remedy imposed by the Board and affirmed on appeal is also obviated by the absence of findings by either the Board or by the ALJ that any of the alleged violations became known outside of the stores in which they purportedly occurred or that they created a "chilling effect" at other locations. In this regard, *Florida Steel Corp.* v. *NLRB,* 646 F.2d 616 (D.C. Cir. 1981) is directly on point. In that case, the Court refused to accept the Board's conclusory statements and found that the Board failed to make the necessary findings, stating:

> [T]hat these corporate-wide remedies are necessary to offset coercive or chilling effects caused by the employer conduct

> at issue, even as that conduct is magnified by previous violation of the Act. The Board has not yet demonstrated that it is reasonably foreseeable that such effects have been produced on a corporate-wide basis.

Id. at 640.

The Court in *Florida Steel* applied this standard despite the long history of egregious behavior exhibited by Florida Steel, but absent here. Clearly, the standard enunciated in *Florida Steel* requiring the Board to demonstrate company-wide effect cannot be met in the instant case.

Although the remedy prescribed by the Board and affirmed by the Court of Appeals here is division-wide and not company-wide, the Board did not make findings regarding the necessity or appropriateness of a broad remedy. Following the compelling mandate of *Florida Steel*, the division-wide remedy should be overturned. Absent evidence that the unfair labor practices at Herkimer had any impact at any other store, any remedies must be limited to the one store involved in this matter. *See Read's Inc.*, 228 NLRB 178 (1977); *Dover Corp., Norris Division*, 211 NLRB 955 (1974), *enforced on other issues*, 535 F.2d 1205 (10th Cir. 1976), *cert. denied*, 429 U.S. 978 (1976).

The NLRB itself has seen fit to apply the *Florida Steel* standards. In *Conair Corp.* v. *NLRB*, 721 F.2d 1335 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984), the Circuit Court upheld the Board's remedy which was limited to the plant in which the unfair labor practice violations took place despite its findings that Conair's violations of the labor law were "outrageous and pervasive" and prescribed an otherwise extraordinary remedy. *Id.* at 1384-85. Moreover, in *Lewittes Furniture Enterprises, Inc.*, 244 NLRB 810 (1979), the Board required posting at only one plant in Taylorsville, North Carolina, despite the presence of another plant in the same town, and in *Wolverine World Wide, Inc.*, 243 NLRB 425 (1979) the Board required posting at only one plant despite the presence of other plants in the state of Michigan and a long history by the employer of unfair practices.

Notwithstanding these well-reasoned precedents, the Board at bar—six and one-half years after the matter was submitted to the Board for decision—vindictively applied the Second Circuit's reasoning in the *J.P. Stevens* cases, which is wholly inapposite to this record. As Chairman Dotson stated in his vigorous dissent, "[t]o compare [Nichols'] unfortunate but limited history of unfair labor practices to the widespread and pervasive practices engaged in by J.P. Stevens defies common sense" (App. 64c).

The instant case is not appropriate for implementation of the remedies propounded in *J.P. Stevens*, where, unlike here, there were large scale, broad-based violations of the Act. *J.P. Stevens & Co., Inc.* v. *NLRB* ("Stevens I"), 380 F.2d 292 (2d Cir. 1967), *cert. denied*, 389 U.S. 1005 (1968), involved the discharge of employees in 20 of 43 plants in two states. *Textile Workers Union of America, AFL-CIO* v. *NLRB* ("Stevens II"), 338 F.2d 896 (2d Cir. 1967), *cert. denied*, 393 U.S. 836 (1968), involved *18 discharges* in the same plants as in *Stevens I. J.P. Stevens & Co., Inc.* v. *NLRB* ("Stevens III and IV"), 406 F.2d 1017 (4th Cir. 1968) involved discrimination against *20 employees* in *five plants.* In stark contrast, Nichols was found to have committed unfair labor practices in respect of a few individuals, in only *one* store. Even the Board's majority decision recognized the vast distinction between *J.P. Stevens* and Nichols, stating:

> The massive multiplant violations by J.P. Stevens are not parallel to S.E. Nichol's [sic] history, which involves a smaller number of proceedings, *each restricted to one facility.*

(Emphasis supplied) (App. 34c).

Thus, the *J.P. Stevens* cases are readily distinguishable by the number and degree of the violations. Further, the Court in *Stevens I* relied on the fact that the area in which the plants were located "is geographically limited and contiguous." Here, on the other hand, a geographical underpinning for the Board's broad remedy is far more tenuous. It is also important that the Court in *Stevens I* relied on the Board's finding "that the Company's prac-

tices were 'so extensive and so well publicized that they must inevitably have had a coercive impact' at the remaining plants." *Stevens I*, 380 F.2d at 304. At bar, however, the Board failed to acknowledge the geographic separateness of the store locations and made no findings that the alleged violations had any effect at other locations. Indeed, the Board admitted that the prior Nichols cases were each restricted to one facility (App. 34c).

Given the factual differences between the *J.P. Stevens* cases and the instant case, it is clear that the Court erred in finding that the Board did not abuse its discretion in prescribing its unwarranted and unprecedented remedy. The Board's failure to make the requisite findings as to the effect of the violations, coupled with the inconsistency of the decision with its own precedents, make it apparent that the Board has capriciously extended the breadth of its remedies in order to, as Board Chairman Dotson wrote, justify "punishing the respondent" (App. 65c). As such, the Court of Appeals' affirmance of the Board's posting and mailing remedies must be modified to eliminate their punitive nature and to make them accord with the precedents of the Board and the federal courts.

The Court should grant certiorari to review and limit the application of the *J.P. Stevens* cases, thereby establishing appropriate guidelines for remedies, and limiting any remedies to those which are warranted by the evidentiary record and necessary to effectuate the policies of the Act. Thus, certiorari is appropriate to review the Board's decision-making process, and to enunciate the requirement that the record before the Board must contain evidence to support findings that justify multi-site and extraordinary access remedies.

C. The Court Of Appeals Erred In Finding That The Board Did Not Abuse Its Discretion In Imposing A Notice Reading Requirement

Because the permissible scope of notice reading requirements has been significantly narrower than the permissible scope

of posting and mailing of notices, the Board's notice reading requirement is even more extraordinary than its posting and mailing requirement.

Historically, the Board and the courts have been wary of requiring the reading of remedial notices. The early federal cases upholding the validity of a reading requirement reasoned that a reading of the notice was required to insure the notice's full dissemination. These decisions relied on the illiteracy of the workers receiving notice as a justification for requiring a reading. *See, e.g., NLRB* v. *Texas Electric Cooperatives, Inc., Treating Div.*, 398 F.2d 722, 726 (5th Cir. 1968); *NLRB* v. *Bush Hog, Inc.*, 405 F.2d 755, 758 (5th Cir. 1968). Moreover, courts have found that a reading requirement "is unnecessarily embarrassing and humiliating to management rather than effectuating the policies of the Act." *NLRB* v. *Laney & Duke Storage Warehouse Co.*, 369 F.2d 859, 869 (5th Cir. 1966); *see also International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *NLRB*, 383 F.2d 230, 233 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 904 (1968).

While the Court of Appeals enforced the reading requirement of the Order only at the Herkimer store, and gave Nichols the option of having the notice read by a Board representative, the remedy remains unduly harsh and punitive, and particularly inappropriate in view of the long delay. The remedy may undermine the harmonious relationship that has existed for eight years. Under these circumstances where the remedy may adversely affect relations between labor and management, it must, therefore, be vacated.

D. The Court Of Appeals Erred In Finding That The Board Did Not Abuse Its Discretion In Granting To Unknown Unions *In Futuro* Access To Company Bulletin Boards And Company Premises

Those parts of the judgment which grant unions access to Company bulletin boards and access to Company premises to attend or give speeches, are wholly inappropriate. With respect to

bulletin boards, this proposed provision is unwarranted for three reasons. First, the campaign at Herkimer was not a campaign where the Union did not have sufficient access to employees. Second, there is no ongoing campaign situation; the campaign ended in 1980 when the employees voted 47 to 9 against the Union and the election results were certified without objection. It is a stipulated fact that there are no union organizational campaigns occurring at any other Nichols store, in Korcz' district or elsewhere. There is thus no justification for campaign related remedies. Third, since there is no proof of Company use of bulletin boards in a campaign, the proposed remedy is not proper since union use of bulletin boards is not necessary. *Stevens I*, 380 F.2d at 305.

The unions have easy access to employees, as evidenced by the employee meetings which were held by the Union in respect of the Herkimer store and by the Union's continual correspondence to employees. There is thus no need or justification for extending to unions the extraordinary privilege to come on Company property to post notices. Absent communications problems with employees, union access to company bulletin boards is not warranted. *William L. Bonnell Co., Inc.*, 170 NLRB 14 (1968), *enforced*, 405 F.2d 593 (5th Cir. 1969). The judgment is all the more heinous in this respect since it would grant the unions access to bulletin boards even in the absence of a union organizational campaign.

The ALJ's reasoning in support of this provision is unpersuasive. The ALJ argues that Nichols has "improperly used its available arenas of communication unlawfully" and had "available convenient, inexpensive means of communicating with its employees" (App. 257d). There is, however, no proof in the record, and no finding by the ALJ or the Board, that the Union did not likewise have available convenient, inexpensive means of communicating with the employees. The Union did not make such a claim. Barring such a showing, there is no justification for the granting of access to unions to Company bulletin boards.

The requirements that Nichols permit union agents on Company premises to be present at the making of speeches by Company representatives and to have the right to make speeches themselves on Company premises, are similarly unnecessary and inappropriate given the absence of any charges or findings of lack of union access to employees. In fact, the record below showed that the Union at the Herkimer store held a meeting with employees at an available meeting hall, and that the complaining witnesses in the second case were in constant personal communication with the Union. There was also a steady stream of Union correspondence sent to employees. Accordingly, there is no reason to require the Company to allow union representatives on Company premises with respect to speeches.

The Supreme Court has held:

> It [the Act] does not require that the employer permit the use of its facilities for organization when other means are readily available.

NLRB v. *Babcox & Wilcox Co.*, 351 U.S. 105, 114 (1956).

This principle is conclusive at bar. To permit union agents to make speeches on company property when unions have other, easy access to employees is to improperly promote and facilitate unionization of a company. To be fair, if the Court's remedy is upheld, the employer should also have the right to attend meetings called by unions for the purpose of there presenting the employer's views. Otherwise, the employee will be able to attend some meetings at which the union alone may speak and no meetings at which the Company alone may speak. The inherent unfairness of this and the unbalanced and improper effect it can have on an employee in the exercise of Section 7 rights is obvious. The statutory policy of encouraging collective bargaining, protecting employee freedom of associations, and self-organization (29 U.S.C. §151) is not met when the government injects its presence onto the scene and gives its imprimatur to the union's organizational activity. Excessive, overbroad remedies create that

impression and go beyond the protection of employee freedom of choice and association and in fact, encourage or influence a choice.

Moreover, such access by union representatives as the judgment requires is constitutionally defective. Nichols is a discount department store which is open for the purpose of selling goods to the public. It permits on its premises those persons who wish to purchase its merchandise and certain governmental representatives. It is under no obligation to permit any other persons on its premises. The judgment provides for union representatives to be on Company property for a purpose for which they would normally have no right or business to be there. The extension of such a right to union business representatives without a strong and overwhelming public purpose, becomes an unconstitutional, impermissible deprivation of a property right.

II.

The Court Below Incorrectly Enforced The Board's Order Because The Board Inordinately Delayed In Rendering A Decision Which Is Now Moot

Although the Court below explicitly stated that it was "troubled" by the Board's six and one-half year delay in rendering a decision (App. 55a), the Court nevertheless stated that this delay did not provide "a justification in this case for refusing to enforce an order designed to ensure the company's employees the right to participate freely in union activities" (App. 55a). As noted above, here, for a variety of readily apparent reasons, the Board's remedies are not necessary to effectuate the policies of the Act—indeed overly broad, long delayed remedies will destroy the balancing of interests and harmony promoted by the Act. Since there have not been any charges against Nichols in the more than eight years since the ALJ's decision, the judgment below is unwarranted.

The Court below erred in enforcing the Board's Order because of the inexcusable and inexplicable delay by the Board in

deciding whether to affirm the ALJ's decision. *See, e.g., NLRB* v. *J. Coty Messenger Service, Inc.*, 763 F.2d 92, 101 (2d Cir. 1985) (Second Circuit denied enforcement of bargaining order where four years passed since the charges were filed against the employer, and more than two and one-half years elapsed since the hearings on those charges closed); *NLRB* v. *Marion Rohr Corp., Inc.*, 714 F.2d 228, 232 (2d Cir. 1983) (Second Circuit denied enforcement of bargaining order where, like *J. Coty*, four years elapsed since the charges against the employer were filed, and more than two and one-half years had passed since the hearings on those charges were held); *see also NLRB* v. *National Casket Co. Inc.*, 107 F.2d 992, 995 (2d Cir. 1939) ("When a complaint involves the granting of affirmative relief against an employer, it is particularly desirable that the case be prosecuted to conclusion with as much expedition as is reasonably practicable, for any unnecessary delay results in obvious hardship to the employer, since the longer the delay the larger the sum he must pay for work never performed, if the order requires reinstatement of employees with back pay.") *Id.* at 995.[4]

Here, the Board inexplicably did not render a decision for over *six and one-half years* after the ALJ's decision. The Court should take judicial notice of the fact that during the *entire* period, and continuing to date, not a *single* unfair labor charge has been filed against Nichols. This fact is crucial in light of the strict policy of the Act, 29 U.S.C. §160(c); *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 10-12 (1940). For a proposed remedy to stand, it must, under Section 10(c) of the Act, "effectuate the policies of [the Act]." 29 U.S.C. §160(c). If it is, instead, an attempt to be vindictive and

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[4] The Court of Appeals also erred by granting the Board's application after the Board delayed over eight months in seeking enforcement of its Order. See, *e.g., NLRB* v. *World Carpets of New York, Inc.*, 403 F.2d 408, 409 (2d Cir. 1968). (Where the Board waited more than a year after rendering a decision before seeking enforcement, the Second Circuit instructed that "[s]uch unexplained delay is inimical to the proper administration of the National Labor Relations Act.")

nonremedial and is not based upon the conduct alleged in the pending proceeding, it will not be enforced. *Florida Steel Corp.* v. *NLRB*, 620 F.2d 79, 82 (5th Cir. 1980).

In *MCI Telecommunications Corp.* v. *F.C.C.*, 627 F.2d 322 (D.C. Cir. 1980), Circuit Judge Wald, writing for the Court, reasoned:

> Many of the same considerations that impel judicial protection of the right to a speedy trial in criminal cases or implementation of civil decrees with all deliberate speed are not inapposite in agency deliberations. Those situations generally involve protection of constitutional rights, but delay in the resolution of administrative proceedings can also deprive regulated entities, their competitors or the public of rights and economic opportunities without the due process the Constitution requires.

Id. at 341

The same reasoning is applicable to the present record. After the excessive, unexplained delay in rendering a decision, the harmonious labor relations present for the past eight years can only be disrupted by a reawakening of former conflicts or differences.

In this respect, it is significant that an NLRB enforcement action is mooted, where, as here, a party can establish that there is no reasonable expectation that the wrong will be repeated. *NLRB* v. *Raytheon Co.*, 398 U.S. 25, 27 (1970) (Enforcement proceeding held not moot since, unlike this action, there was no indication that specific acts complained of had not been repeated or may not be repeated in the future). *See also United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *NLRB* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 428 (1947), *reh'g denied*, 331 U.S. 868 (1947).

Where there have been no unfair labor practice charges filed against Nichols for more than an eight year period, a remedy which seeks to impose the broad, unprecedented sanctions at issue before this Court can hardly effectuate the policies of the Act. To the contrary, such a remedy will serve only to punish Nichols

and stir labor unrest where harmonious labor relations have existed for more than eight years.

As a final gauge of the vast overbreadth of the Court's judgment, it is significant to note that upon review of the ALJ's findings, the Board found that Nichols neither: (1) directed or advised employees not to sign union authorization cards or any papers other than pay receipts, nor (2) promulgated, maintained, or enforced any rule prohibiting employees from soliciting or distributing written materials on behalf of any labor organization during working time. Incredibly, however, the Board saw fit to impose a remedy compelling Nichols to cease and desist from each of these activities in which the Board *itself* found Nichols not to be engaging (App. 36c-41c). That the Court of Appeals permitted the Board to overstep its bounds on these two matters merely highlights the appropriateness of review by this Court.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that a Writ of Certiorari be granted in order to provide the Court with the opportunity afforded by this the record to establish appropriate constitutional standards for the review of long-delayed, overly broad remedial orders of the NLRB; standards that comport with constitutional principles of free speech, due process and equal protection of the law.

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Respectfully submitted,

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